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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

J.V. PETERS & COMPANY, an Ohio Partnership, and
DAVID B. SHILLMAN
Petitioners,

vs.

UNITED STATES OF AMERICA,
CAROL BROWNER, Administrator of the
U.S. ENVIRONMENTAL PROTECTION AGENCY, and the
U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondents.

PETITION FOR WRIT OF CERTIORARI
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the doctrine of relation back permits the United States Environmental Protection Agency to recover civil penalties from private parties despite deliberately failing to sue those parties within the applicable statute of limitations where, despite its "basically inexcusable conduct," the agency was granted leave to file an amended complaint after the limitations period expired, but failed to do so for more than 21 months after the limitations period expired?

2. Whether the Fifth Amendment to the United States Constitution prevents the United States of America from recovering a civil penalty from parties who were sued nearly two years beyond the statute of limitations where the Government failed to make even a *prima facie* case that these parties had violated the regulations at issue, or that they were subject to a civil penalty?

PARTIES

Petitioners are J.V. Peters & Company, an Ohio partnership, and David B. Shillman, an individual. Respondents are the United States of America, the U.S. Environmental Protection Agency and Carol Browner in her official capacity as Administrator of the U.S. Environmental Protection Agency. None of the petitioners have parent companies or subsidiaries.

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CITATIONS TO PRIOR OPINIONS

The decision of the United States Court of Appeals for the Sixth Circuit rendered on June 29, 2000, and from which this appeal is taken, was not recommended for publication but is cited in a table of unreported decisions at 221 F.3d 1336 and may be found at 2000 WL 923761 (June 29, 2000).

The initial decision of the Administrative Law Judge rendered on May 15, 1985 is also unreported, but may be found in 1985 WL 57141 (EPA). The EPA's Chief Judicial Officer's decision reversing and remanding the ALJ's decision is unreported, but may be found at 1986 WL 69028 (May 9, 1986). The Chief Judicial Officer's decision affirming his reversal on reconsideration is likewise unreported, but may be found in 1986 WL 69034 (October 23, 1986). The ALJ's decision dismissing EPA's case with prejudice is unreported totally. His decision to reinstate the case and have EPA's "second amended complaint" be deemed filed is likewise unreported totally. The ALJ's decision granting EPA's Motion for Accelerated Decision is unreported. The EPA's Chief Judicial Officer's decision on appeal, affirming the ALJ's decision, is unreported, but may be found at 1990 WL 303851 (Aug. 7, 1990). The decision of the United States Court of Appeals for the Sixth Circuit remanding the appeal from the Chief Judicial Officer's decision to the U.S. District Court for the Northern District of Ohio may be found at 923 F.2d 954 (unpublished opinion). The decision of the U.S. District Court for the Northern District of Ohio in Case No. 1; 90 CV 2246 (Manos, J.) reversing and remanding the Chief Judicial Officer's decision dated August 7, 1991 is not reported. The decision of the ALJ after remand is unreported, but may be found at 1995 WL 442019 (July 18, 1995). The decision of the Environmental Appeals Board affirming the ALJ's decision is not reported, but may be found at 1997 WL

221388 (April 14, 1997). As noted above, the decision of the U.S. District Court affirming the Environmental Appeal's Board's decision is not reported. Shillman *et al.* v. United States of America *et al.*, Case No. 97 CV 1355 (January 14, 1999). All such opinions are included in the Appendix hereto.

JURISDICTION

This Court has jurisdiction under Article III to the United States Constitution, 28 U.S.C. § 1254, and Sup. Ct. R. 10 to consider and grant this Petition for a Writ of Certiorari. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 2000, and this Petition for a Writ of Certiorari is being filed within 90 days of that date pursuant to, and consistent with, Sup. Ct. R. 12, 21 and 29.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, Section 2462 of the United States Code reads as follows:

> Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Title 42, Section 6928(a) of the United States Code (part of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*) reads in pertinent part at the time the complaint was filed against Petitioners as follows:

> Whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specific time period . . . If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance . . .

STATEMENT OF THE FACTS

On April 17, 1981 the United States Environmental Protection Agency ("EPA") filed an administrative complaint against, and assessed a $25,000 civil penalty to, non-petitioner J.V. Peters & Co., Inc., an Ohio corporation ("Peters"). The penalty was based on Peters' claimed violations of EPA's "interim status standards" at a solvent reclamation facility in Geauga County, Ohio.[1],[2] Peters filed an answer with EPA's Region V hearing clerk in Chicago in accordance with EPA's procedural rules.[3] Peters denied violating any of the interim status standards and its

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[1]. The EPA's complaint was filed pursuant to 40 C.F.R. § 22.13 (1981). The EPA enacted so-called "interim status standards" in May 1980 pursuant to Section 3005(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6925(a). These regulations imposed operating standards on facilities engaged in the "treatment storage or disposal of hazardous waste." *See*, 40 C.F.R. Part 265. In addition, owners or operators of such facilities were required to have "a permit issued pursuant to this section." 42 U.S.C. § 6925(a). The permit was divided into two parts, A and B. "Part A" was a registration form and had to be filed by a certain date. Upon timely submission of Part A, an existing facility was accorded "interim status," meaning it could continue to operate until, and unless, EPA denied its "Part B" application. 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70 (1980). An entity with "interim status" was required to submit a Part B application when required by EPA. The Part B application required a great deal of information about a facility including detailed information about wastes stored and processed at the site, and plans and facilities for preventing environmental contamination. *See*, 40 C.F.R. Part 270. The facility in question filed a timely Part A application and was operating as if "having been issued a permit" when the alleged violations occurred. 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70 (1981).

[2]. The alleged violations of the "interim status standards" were observed by an agent for the Ohio EPA on December 17, 1980. The Ohio EPA did not have any enforcement authority under RCRA at the time. *See*, 42 U.S.C. § 6926 and 40 C.F.R. Part 271 relating to state enforcement programs.

[3]. These rules are set forth in 40 C.F.R. Part 22 (1999) entitled, "Consolidated Rules of Practice Governing the Administrative Assessment of Civil

liability for the proposed $25,000 penalty. In fact, Peters did not exist when the claimed violations giving rise to the proceeding occurred (December 17, 1980). Peters was incorporated on January 31, 1981.

About a month later, Petitioner David B. Shillman, Peters' then-president, informed EPA that a partnership called J.V. Peters & Company owned and operated the facility when the claimed violations occurred. Shillman also told EPA that Peters was formed on January 31, 1981. At about the same time, EPA learned the Ohio EPA had filed suit against Peters, J.V. Peters & Company (the partnership) and David Shillman for violations of state law at the facility.[4] Despite this knowledge, EPA elected not to amend its complaint.

An administrative law judge was appointed pursuant to 42 U.S.C. § 6928(b). However, EPA took no steps to prosecute the complaint. On September 20, 1983, 28 months after filing the complaint, EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice pursuant to 40 C.F.R. § 22.14(e) (1983).[5] Peters did not object and the case was dismissed.

Penalties and the Revocation and Suspension of Permits."

[4]. Petitioner Shillman was not a partner in J.V. Peters & Company. The partners were non-petitioners Dorothy L. Brueggemeyer, Shillman's wife, and non-petitioner John Vasi, now deceased.. Shillman has readily acknowledged he was the manager of the facility on December 17, 1980.

[5]. In its motion to dismiss, EPA said it did not "intend to waive, discharge, or otherwise dispose of any claims it may have against J.V. Peters and Co., Inc. or any officer, agent, employee, successor or assigns thereof." The EPA made no mention of *predecessors* in interest.

Approximately five months later (specifically on February 3, 1984) EPA re-filed the complaint, again naming only Peters as the respondent.[6] Peters answered and denied any violations by Peters of the interim status standards on December 17, 1980 (as it did *not* exist on that date). Peters asserted as an affirmative defense that EPA had failed to name one or more necessary parties; however, it did not expressly identify in its pleading that J.V. Peters & Co. or Mr. Shillman (or anyone else for that matter) *could* be liable for the violations and the proposed penalty.[7]

Thereafter, in response to discovery, Peters provided its articles of incorporation and other corporate documents to EPA showing Peters did *not*, in fact, exist on the date of the alleged violations. The EPA still made no effort to amend its complaint to add either the partnership or Shillman as respondents.

On October 23-25, 1984 the ALJ conducted a hearing on EPA's complaint. In his opening statement, EPA's counsel acknowledged the facility at issue was originally operated by J.V. Peters & Company, a partnership, and expressed his understanding that Peters, the corporation, later came to operate it. After EPA rested, Peters moved for a directed verdict on the grounds Peters did not exist on the date of the supposed violations (December 17, 1980) and therefore, given the

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[6]. While EPA styled its refiling as a "First Amended Complaint," it was, in fact, a new complaint since the original complaint had been dismissed without prejudice. The refiled complaint was assigned the same case number by the hearing clerk in EPA's Region V in Chicago.

[7]. This fact was relevant to the manner in which the United States Court of Appeals for the Sixth Circuit decided the case on June 29, 2000, as we will show below.

evidence, was not liable for the acts of the predecessor partnership.[8] After the ALJ denied Peters' motion, Peters presented uncontradicted evidence that it was incorporated on January 31, 1981, nearly 45 days after the purported violations. Evidence was also presented that the partnership called J.V. Peters & Company operated the facility on December 17, 1980, and that Shillman managed the facility for the partners, Dorothy L. Brueggemeyer and John Vasi.

Nearly six months after the hearing was concluded (specifically on April 15,1985), and after Peters and EPA had filed proposed findings of fact and conclusions of law, EPA filed a "motion to conform pleadings to the proofs." The EPA sought, for the first time, an order that the complaint be "deemed amended to reflect the personal liability of David B. Shillman and the liability of the partnership known as J.V. Peters [&] Company."[9] In response, Peters pointed out that neither Shillman nor the Partnership had ever been made parties to the case, nor had they been given any opportunity to defend themselves. Accordingly, Peters asserted that any order directed at them, without naming them as parties and affording them basic due process rights, would be unlawful.

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[8]. As EPA's Chief Judicial Officer later noted, no attempt was made during the hearing to establish facts that *could* make the corporation liable for the acts of the partnership.

[9]. The EPA said its motion was "precautionary . . . only" since it had orally moved to "conform the pleadings to the evidence" at the October 1984 hearing. However, as EPA's own Chief Judicial Officer, Ronald McCallum, observed in initially reversing the ALJ's decision, EPA's "oral motion" did not relate to adding parties to the case at all. Rather, in response to an objection about evidence regarding possible interim status standards at the facility on a date other than December 17, 1980, EPA's counsel said that "to the extend Mr. English is insisting on strict rules of pleadings [sic] . . . the record should reflect that the evidence and the pleadings be allowed to conform themselves." (Tr. 43).

Peters also pointed out that "[i]f [EPA] wished to sue Mr. Shillman or the partnership, [EPA] should have done so."[10, 11, 12]

The ALJ did *not* grant EPA's motion and, most certainly, neither Shillman nor the partnership were made parties.[13] Nevertheless, on May 15, 1985, the ALJ held them liable for the civil penalty (as well as Peters). *See,* 1985 WL 57141 (EPA). As to Shillman, the ALJ reasoned that

> even though [he is] technically not a party respondent ... [he] was and is so directly connected with the Respondents [sic] interests by his individual interest in the result and by his active participation in the case as to be bound as a party Respondent herein and the assessment of a civil penalty against David B. Shillman, severally and jointly with his partners, if any is appropriate.[14]

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[10]. The EPA did not seek to add Dorothy L. Bruggemeyer as a respondent.

[11]. The term "respondent" means "any person proceeded against in the complaint" (emphasis supplied). 40 C.F.R. § 22.03(a)(1998).

[12]. EPA could still have sued Shillman and the partnership since the statute of limitations had not yet run. The limitations period expired on December 17, 1985, well more than a year *after* EPA filed its motion. *See*, 28 U.S.C. § 6902.

[13]. EPA's Chief Judicial Officer later observed that the "Motion to Amend" was "untimely" and "clearly prejudicial" to the ability of the unnamed parties to "mount a defense."

[14]. The ALJ further reasoned Shillman was liable because the Corporation had hired unspecified "professional advisors" to protect "interests which were, in fact, the interests of Shillman [and because Shillman] participated in the presentation of said defense ... there was no need or necessity to issue a summons for him or to amend

The ALJ reasoned that the partnership could, and should, be held liable for the civil penalty because

> [w]here a corporation is formed by members of a partnership with the intent of shielding partnership members from civil penalty obligations, if a 'mere transformation' is made with the real parties in interest remaining the same, no real change has taken place and creditors may look to the members of the partnership for satisfaction.

EPA's procedural rules allow an appeal to the Administrator. Therefore, Peters, J.V. Peters & Company and Shillman all appealed. Chief Judicial Officer Ronald McCallum was appointed by the Administrator to hear their appeal pursuant to 40 C.F.R. § 22.30 (1986).[15] On May 9, 1986 Chief Judicial Officer McCallum issued a remarkably blunt, but wholly appropriate opinion. *Inter alia*, McCallum said:

> [EPA] has not offered an excuse for its lack of diligence in seeking to amend the complaint to add the unnamed parties. There were several opportunities to name the proper parties in the complaint prior to the hearing. In its original complaint, despite implied notice of the unnamed parties' relationship to the operation . . . [EPA] named only the corporation as

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pleadings to make [him] a new party as he was already a party appearing in the case by counsel."

[15]. All such appeals are now taken to the Environmental Appeals Board ("EAB").

party-respondent. [EPA] failed to amend its complaint after being expressly told by Shillman, during a settlement conference in the summer of 1981, that the business had been incorporated in late January, 1981. . . (footnote omitted) The unnamed parties were not added to the amended complaint, filed on February 2, 1984, despite Complainant's awareness of related litigation in State of Ohio v. J.V. Peters and Co., Inc., *et al.*, Slip op. No. 81 M 272 (Geauga Co. C.P., May 29, 1981) naming the corporation, the partnership, and Shillman as parties-defendant and holding Shillman and the corporation jointly and severally liable for a civil penalty of $15,000.00 (footnote omitted). The complaint was not amended despite [EPA's] receipt of Respondent's Articles of Incorporation, dated January 31, 1981, pursuant to a discovery request.

[EPA] also offers no excuse for failing to move to amend the Complaint during the hearing, following Respondent's motion to dismiss the complaint on the grounds that the corporation did not exist on the date of the alleged violations. Although the Presiding Officer and [EPA] both referred in passing to. . .the potential applicability of the equitable doctrine of 'piercing the corporate veil,' neither one developed this point during the hearing so as to place Shillman and the partnership on notice that they should present a defense to their potential liability. In fact, the Presiding Officer requested that the parties defer discussion of this issue until their post-hearing submissions.

Further, [EPA] offers no excuse for failing to move promptly after the hearing to amend the pleadings to conform to the evidence. The hearing was held in October 1984 but [EPA] did not take action until approximately five months later when the parties received a letter from the Presiding Officer, dated March 28, 1985, requesting clarification of [EPA's] oral motion to amend offered during the first day of the hearing . . . [EPA] responded by filing its written Motion to Amend on April 16, 1985, seeking to add Shillman and the partnership as parties-respondent to the complaint. . . [EPA] sought to relate its written motion back to the first day of the hearing, thereby helping to mitigate against its untimeliness. This attempt to bootstrap the written motion with something that was done at the hearing is not persuasive for the oral motion was directed at an entirely different subject matter . . . **Thus, despite ample knowledge and opportunity throughout these proceedings, fair notice comporting with Federal notions of due process was never given to the unnamed parties as to their potential liability, nor has [EPA] offered any excuse for the untimeliness of its written Motion to Amend.** (emphasis provided; underling in original).

* * * * *

. . . [The fact that Shillman] participated as a witness in the defense of the corporation [does not] either alone or in conjunction with findings purporting to identify Shillman as the real party in interest . . . justify holding

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> [him] liable without first filing charges against him and giving him an opportunity to answer these charges, including the right to present evidence at a hearing to refute the charges that he is in fact the real party in interest. . . I am persuaded that Shillman and the partnership are entitled to nothing less.

McCallum summed up EPA's conduct quite nicely when he concluded that **"EPA's error was basically inexcusable."** (emphasis provided). However, instead of just dismissing the case at that point, McCallum gave EPA "leave to amend" if it wishes to do so. EPA filed a motion for reconsideration in August 1986.[16] On October 23, 1986 McCallum denied EPA's motion and affirmed his order.

In December 1986 the ALJ asked EPA to ". . . advise [him] on or before December 26, 1986 how [EPA] will proceed with the instant case 'in a manner consistent with' [McCallum's order of remand] by advising which, if any, of the options suggested in said option [EPA] will pursue." EPA ignored this order.

Nearly eight months later (on July 27, 1987), the ALJ dismissed EPA's "first amended complaint" filed on April 3, 1984. The ALJ did so because "[EPA has] failed and refused to comply with my said Order. . . and is therefore in default. In the premises, I find that said case should be and it is hereby dismissed with prejudice."

EPA filed a "Motion for Relief from Default Order and Motion for Leave to File Second Amended Complaint" more than 45 days later.

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[16]. Motions for reconsideration are authorized by 40 C.F.R. § 22.32 (1987).

Having already dismissed the case *with* prejudice, the ALJ inexplicably reversed himself and granted EPA's motion. The so-called "second amended complaint" was deemed filed on September 9, 1987.

EPA finally named J.V. Peters & Company, David B. Shillman, Dorothy L. Brueggemeyer, and John Vasi as respondents (in addition to Peters, the corporation).[17] The new parties (except for John Vasi)[18] all answered the complaint, denied having violated the regulations on December 17, 1980, and contested the assessment of the civil penalty. Each of the new parties also asserted the action as to them in light of the five-year statute of limitations in 28 U.S.C. § 6902.

On April 13, 1988 EPA moved for an "accelerated decision" contending the new parties were all "bound" by the ALJ's "findings" based on the October 1984 hearing at which only Peters was a respondent.[19],[20] The new parties opposed EPA's motion and asserted they were each entitled to a hearing at which they could defend themselves from EPA's claims. On September 30, 1988 the ALJ

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[17]. Peters also answered and again denied all liability.

[18]. A default judgment was entered against Mr. Vasi. He has since died.

[19]. An "accelerated decision" is permitted by 40 C.F.R. § 22.20 (1994) which provides, in material part, that such may be granted to any party upon motion if "no genuine issue of material facts exist and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." This is functionally equivalent to the summary judgment procedure in Fed. R. Civ. P. 56(c).

[20]. EPA claimed respondents Vasi and Brueggemeyer were jointly and severally liable for the $25,000 civil penalty because they were the "owners" of the facility on the date in question. As to Shillman, EPA argued that he was jointly and severally liable for the penalty because he was allegedly "in charge" of the facility on December 17, 1980.

granted EPA's motion as to Shillman, Brueggemeyer, and the Partnership and held them jointly and severally liable for a $25,000 civil penalty. The ALJ found Peters not liable.[21]

The new parties appealed to the Administrator for a second time. This time, the same Chief Judicial Officer affirmed. Judicial review was sought in the United States District Court for the Northern District of Ohio (Case No. 1:90 CV 2246).[22],[23] On August 12, 1991 District Judge John Manos reversed and remanded, finding the Chief Judicial Officer's decision "arbitrary and capricious and in violation of the law." Specifically, Judge Manos held that RCRA

> clearly and unconditionally mandates a hearing wherein each of the respondents, none of whom were represented at the October 1984 hearing, are given the opportunity to present evidence in their own defense. The text of the statute and due process require nothing less.

However, the District Court affirmed the Chief Judicial Officer's conclusion that EPA's claim against the new parties was not time barred because the September 1987 complaint allegedly "related back" to the initial complaint. The District Court mistakenly determined

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[21]. EPA did not appeal the decision in relation to Peters and, accordingly, that part of the case was *finally* over.

[22]. The appeal was initially filed in the United States Court of Appeals for the Sixth Circuit. However, on joint motion, and pursuant to 28 U.S.C. § 1631, the case was transferred to the District Court.

[23]. Such review was sought pursuant to Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706.

that the Chief Judicial Officer had properly applied the doctrine of relation back in F.R.C.P. 15(c) to this action when, in fact, that doctrine had not been applied as this Court instructed in Schiavone v. Fortune, 477 U.S. 21 (1986).[24],[25]

On remand, a new administrative law judge was assigned. On March 18, 1995, more than 14 years since the filing of the initial complaint, EPA filed a "Motion for Leave to Amend" the September 1987 complaint to seek additional civil penalties from Shillman, Brueggemeyer, and the Partnership. EPA was granted leave to file the complaint and the new parties answered. *Inter alia*, they asserted that the new claims, like those previously asserted, were time-barred.

Shortly thereafter, the new parties moved for an "accelerated decision" to dismiss the new complaint on statute of limitations grounds.[26] EPA quickly responded with a "Motion to Voluntarily Withdraw the Third Amended Complaint and [to] Reinstate [its] Second Amended Complaint" purportedly to avoid "any tangential dispute over

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[24]. The new parties initially appealed to the United States Court of Appeals for the Sixth Circuit but withdrew their appeal when EPA stipulated the District Court's decision on that issue was interlocutory in light of the remand order. (Case No. 91-3846).

[25]. The new parties pointed out that the doctrine only applied if EPA mistakenly failed to name them during the limitations period. Since this could not possibly be the case, the doctrine of relation back should not apply.

[26]. Petitioners renewed this argument at the time of the hearing on October 3, 1994 (Tr. at 69-72).

the affect [sic] of the proposed Third Amended Complaint to distract from or delay a hearing on the merits of this case."[27]

The new parties did not object to dismissal of the new complaint, but vehemently opposed "reinstatement" of the September 1987 complaint. Predictably, the new ALJ permitted EPA to withdraw the third complaint and reinstated the September 1987 complaint. By separate order, the new ALJ also held that the September 1987 complaint somehow "related back" to the initial complaint filed by EPA against Peters, alone, on April 21, 1981.

A second evidentiary hearing was scheduled for October 3, 1994.[28] On that date, EPA – which had the burden of production and persuasion – failed to adduce any evidence establishing the claimed violations, the new parties' liability therefor, or the appropriateness of the proposed civil penalty as to any of them. In fact, EPA called just one witness – the original inspector from the Ohio EPA. EPA's examination of this witness was limited to whether she "recalled" testifying at the prior hearing nearly ten years earlier (she did), whether she had "reviewed her testimony" (she had), and whether she would change her testimony "in any way" (she would not).

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[27]. EPA made this argument with a straight face knowing that nearly 14 years had elapsed from the time of the supposed violations.

[28]. The second hearing was held 21 days short of *ten years* after the first evidentiary hearing.

Since EPA failed to establish even a *prima facia* case, the new parties declined to cross examine her.[29] The "hearing" ended.

The new ALJ then issued a decision wherein he concluded the evidence from the original hearing in October 1984 could be "incorporated" in the record against the new parties because they were "given the opportunity to cross-examine the witnesses on their prior testimony and to present evidence on their own behalf" at the October 1994 hearing. Based on the "incorporated" evidence, the ALJ concluded EPA had proved that certain interim status standards had been violated on December 17, 1980, and the new parties were jointly and severally liable for a civil penalty of $23,500.00.[30]

The new parties appealed to the Administrator. On April 14, 1997 the Environmental Appeals Board ("EAB") issued a 40- page decision affirming the ALJ's decision.[31] *See*, 1997 WL 221388 (April 14, 1997). The EAB disclaimed authority to decide the statute of limitations question based on its view that the District Court's 1990 decision was the "law of the case" from which it had no "power to deviate." EAB likewise rejected the assertion that the District Court's

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[29]. In light of EPA's indication that Dr. Homer, its second witness, was being offered solely for cross-examination regarding his testimony at the October 1984 hearing (at which none of the new parties was a party and at only a portion of which David B. Shillman was present as a witness), their counsel informed the ALJ that he did not intend to cross-examine him absent direct testimony. EPA thus opted to not have Dr. Homer attend the hearing.

[30]. The ALJ also affirmed his view that the September 1987 complaint was not time-barred.

[31]. The Environmental Appeals Board is a "permanent body" within EPA. *See*, 20 C.F.R. § 1.25 (1999).

remand order did not permit EPA to rely on evidence adduced in the October 1984 hearing at which Petitioners were not parties.

The new parties again sought judicial review in the District Court pursuant to Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. The parties filed cross-motions for summary judgment. The new parties asked the District Court to revisit the question of whether the doctrine of relation back saved EPA's September 1987 complaint. They likewise sought a summary judgment on the grounds that EPA failed to prove any violations of the interim status standards by them on December 17, 1980, or their liability for any civil penalty

On January 14, 1999 the District Court granted EPA's motion. The new parties (David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters & Company, the partnership) appealed to the United States Court of Appeals for the Sixth Circuit. On June 29, 2000 the Sixth Circuit, 2-1, upheld the District Court's judgment with respect to Shillman and J.V. Peters & Company, but reversed as to Brueggemeyer. *See*, 2000 WL 923761 (June 29, 2000).

David B. Shillman and J.V. Peters & Company now seek review in this Court to decide the important questions presented.

ARGUMENT

I

RELATION BACK DID NOT SAVE EPA'S UNTIMELY AMENDMENT OF ITS ADMINISTRATIVE COMPLAINT FOR CIVIL PENALTIES AGAINST THE PETITIONERS.

The Sixth Circuit, 2-1, seriously erred when it upheld EPA's assertion of claims against parties that were sued 21 months after the statute of limitations had run, and despite EPA's knowledge of these parties well before that limitations period expired. This decision is directly contrary to F.R.C.P. 15(c) and this Court's holding in Schiavone v. Fortune, 477 U.S. 22 (1986). Indeed, it turns to the doctrine of relation back entirely on its head. It must be reversed.

The purpose of a statute of limitations is to prevent stale claims, to ensure fairness, and to prevent surprise from institution of a claim that has been dormant for so long that proof, witnesses and memories have disappeared. Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1074 (2d Cir. 1993). By the time leave to amend was granted in this case (September 1987), nearly seven years had elapsed, two more than the statute of limitations allowed.

It has been said that "courts generally allow the relation back of amendments to add claims more freely than amendments to add parties." 3 Moore's Federal Practice § 15.19[3][a] at 15-85 (2000). In Schiavone, *supra*, this Court held that relation back applied only in the following circumstances:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake in identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period"

Id. at 28.[32]

The first two factors are not at issue here. In other words, we do not dispute that EPA's "basic claim" against Petitioners arose out of the conduct set forth in the original pleading, and that Petitioners had actual notice of the claim within the five-year limitations period such that they would not be prejudiced in maintaining their defense. However, relation back cannot occur here because none of the Petitioners knew, or should have known, that EPA would have sued them but for a mistake in identity. As we set forth above, EPA clearly knew of the Petitioners well before the statute of limitations expired but obdurately refused, or otherwise failed, to sue them. EPA consciously chose to sue Peters and not the Petitioners. This was not a mistake in identity whatsoever. *See*, Louisiana Pac. Corp. v. ASARCO, Inc., 5

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[32]. While this Court held in *Schiavone* that the party to be brought in must have received notice such that it would not be prejudiced in maintaining its defense within the statute of limitations, that rule has now been changed by F.R.C.P. 15(c)(3) which now provides that such notice must be provided within 120 days after filing the complaint. The requirement that a party (such as the Petitioners in this instance) have known about, or should know about, a mistake in identity *within the limitations period* remains sound law.

F.3d 431, 434 (9th Cir. 1993);[33] In re Integrated Resources Real Estate Ltd. Partnership Sec. Litig., 815 F. Supp. 620, 648 (S.D. N.Y. 1993); *See*, too, Levy v. United States General Accounting Office, 175 F.3d 255 (2nd Cir. 1999)(amendment sought to avoid statute of limitations was not the type of "mistake" contemplated by F.R.C.P. 15(c)(3)(B).[34]

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[33]. This case is analytically very similar to the one at bar. Asarco sold copper slag to a subsidiary of Industrial Mineral Products ("IMP"). IMP in turn sold it to logyards (and split the proceeds with Asarco). The logyards used the slag as a base for equipment operations. The logyards eventually discovered heavy metals were leaching from the slag, contaminating groundwater. The owners and operators of the logyards brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. ¶¶ 9601 *et seq.* against Asarco. Asarco filed a third party complaint against L-Bar Products, Inc., claiming it was a successor-interest to IMP (since L-Bar had purchased IMP's assets). Asarco later moved to add IMP as a party defendant. While the motion to amend was granted, IMP was later granted summary judgment because a Washington statute provided that no action could be brought against it more than two years after it was dissolved. The amended pleading was filed more than two years after IMP was dissolved. Id. at 433. Asarco argued this was error, since its claim against IMP allegedly related back to when it first impleaded L-Bar Products, Inc. (as IMP's alleged successor-in-interest). The Ninth Circuit rejected this assertion based on the third factor in Schiavone, *supra*. The Ninth Circuit held that Asarco needed to prove that (1) it made a mistake of identity in failing to sue IMP when it sued L-Bar and (2) IMP knew or should have known, by the time the limitation period expired, that Asarco had made the mistake. Id. at 434. Rejecting Asarco's argument, the Court said: "Asarco didn't make a mistake. It knew who those parties were and made a mistake in who it determined it ought to sue under the circumstances. This mistake under Rule 15(c) has to be as to identity, and there was no mistake as to the identify of IMP." Ibid. Just like Asarco, EPA made no mistake here. It knew who Petitioners were and of their relationship to the facility at issue well before December 17, 1985. *If* it made *any* mistake by failing to sue Petitioners within the statute of limitations, that mistake was not one of identity, the *only* mistake which justifies relation back after the statute of limitations has expired. Shiavione, *supra* at 28.

[34]. The Advisory Committee Notes to F.R.C.P. 15(c) properly characterizes the rule as dealing with "the problem of a misnamed defendant." An amendment subject to the rule is a "name-correcting amendment." Id. "The rule is meant to allow

The doctrine of relation back simply does not give a party – including an agency of the United States Government – the right to pursue claims after the applicable statute of limitations has expired when it is beyond dispute that the agency was *never* mistaken about the identity of the omitted parties, much less within the limitations period.[35]

Ironically, and consistent with Shiavione, *supra*, the Sixth Circuit has repeatedly held that a complaint cannot be amended to add a party after the statute of limitations runs except where such is to correct a misnomer as to an existing party. Ringrose v. Engelberg Huller, 692 F.2d 403, 405 (6th Cir. 1982); Lovelace v O'Hara, 985 F.2d 847, 850 (6th Cir. 1993)(A mistake in identity is a prerequisite in order for the doctrine of relation back under Rule 15(c) to apply). In fact, it is well settled that "[a] potential defendant who has not been

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an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification." Barlow v. Wethersfield Police Dept., 66 F.3d 466, 469 (2d Cir. 1995), *modified*, 74 F.3d 1366 (1996).

[35]. The District Court relied on an alleged "identity of interests" between Peters, the corporation, and the non-named parties. This analysis reveals a fundamental misapprehension of Shiavione. Whether parties have an an "identity of interest" is relevant only to "whether the party to be brought in . . . received such notice that it will not be prejudiced in maintaining its defense." Shiavione, *supra* at 21. The "identity of interests" concept is based on a presumption that one so closely aligned with a named defendant would suffer no prejudice if brought into the case after the statute of limitation ran. As we have repeatedly stated, this is *not* at issue in this case. The "identity of interests" analysis is, however, simply irrelevant to the third Schiavone factor, *viz.* that but for a mistake in identity occurring within the limitations period, EPA would have sued the omitted parties within the statute of limitations. This factor must *also* be satisfied. Schiavone, *supra* at 28; Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996)("the requirements of Fed. R. Civ. P. 15(c) must be met in order for the amendment adding the named defendant to relate back to the filing of the original complaint").

named in a lawsuit by the time the statute of limitations runs is entitled to repose - unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, so to speak." Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997). A broader rule would result in a "harvest of uncertainty." Id.

Prior to the decision in the case *sub judice*, the settled law in the Sixth Circuit was that "an amendment that adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations." Marlowe v. Fisher Body, 489 F.2d 1057, 1064(6th Cir. 1973); Smart v. Ellis Trucking Co., 580 F.2d 215, 218 (6th Cir. 1978), *cert. denied,* 440 U.S. 958 (1979); In Re Kent Holland Die Casting & Plating, Inc., 928 F.2d 1448 (6th Cir. 1991); Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996), *rehearing and suggestion for rehearing denied, cert. denied,* 520 U.S. 1267, 117 Sup. Ct. 2439 (1997)("such amendments will not survive preclusive application of the statute of limitations unless the amendments are corrections of misnomers," Id. at 220); Simmons v. South Cent. Skyworker's Inc., 936 F.2d 268 (6th Cir. 1991); Allgeir v. United States, 909 F.2d 869 (6th Cir. 1990).

In light of the foregoing, the decision below is of considerable importance. Not only is the decision contrary to established precedent in the Sixth Circuit, it also creates a gaping hole in the law related to the doctrine of relation back. Unless reversed, the decision below will create the very "harvest of uncertainty" that Schiavone and its progeny were designed to avoid.

The majority below sidestepped the relation back doctrine by holding that EPA's April 15, 1984 "motion to conform the evidence to the pleadings," while never granted, was sufficient to allow EPA to

proceed against parties it did not sue until 21 months after the statute of limitations expired.

Worse yet, the majority held that the "motion to conform the pleadings to the proofs" was sufficient even though EPA never filed a proposed pleading. In fact, EPA did not seek leave to file an amended complaint *per se*; instead, it sought, by fiat, to amend the complaint after the fact such that Petitioners could be held liable without any due process. Further, that motion was *never granted*. Instead, EPA was given leave to amend its complaint well after the statute of limitations ran.

While there is authority for the proposition that a timely motion to amend a complaint to name a new party within the statute of limitations obviates the statute of limitations defense otherwise available to that party, this is clearly not what happened in the case at bar. EPA never sought to amend its complaint such that new or even the same claims that had been brought against Peters could be made against Petitioners; instead, EPA sought to have the ALJ hold them liable on the theory that the evidence supported this, even though they had never been given notice or any opportunity to defend.

Based on the foregoing, we respectfully submit there is an overarching need for this Court to review the decision of the Sixth Circuit and state with particularity whether a party such as EPA in this instance may avoid the statute of limitations despite its full knowledge of the identity of the omitted parties.

II

PETITIONERS' RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THEY WERE HELD LIABLE FOR CIVIL PENALTIES DESPITE EPA'S FAILURE TO ESTABLISH A *PRIMA FACIE* CASE AGAINST THEM.

Even if Petitioners' statute of limitations argument does not carry the day, EPA still had an obligation to show that violations of the interim status standards occurred on December 17, 1980 and that Petitioners were, in whole or in part, responsible for those alleged violations.

EPA's own consolidated rules of practice establish that EPA has the burden of proof in such proceedings. 40 C.F.R. § 22.24 (1984) ("[EPA] had the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate"). At the hearing in October 1994 EPA merely produced a witness, asked her whether she remembered her former testimony ten years before and if she would "change it" and then tendered the witness to Petitioners.

This is clearly insufficient to prove by a preponderance of the evidence that the violations charged in the complaint occurred, that Petitioners were responsible therefor, or that the civil penalty was "appropriate." 22 C.F.R. § 22.24 (1984).

The due process clause of the Fifth Amendment prevents the deprivation of property without due process of law. Greene v. McElroy, 36 U.S. 474 (1959). In this case, the government seeks to extract from Petitioners a so-called "civil penalty" for their supposed involvement in

violating interim status standards at a solvent reclamation facility in December 1980.

Absent review by this Court, the United States will be permitted to take $23,500 from them without even the most basic due process. The only "hearing" they were ever given was a truncated affair in October 1994 (14 years after the supposed violations occurred) when EPA did nothing other than make their witnesses available for cross-examination.

Before the Petitioners may lawfully be held liable for *any* civil penalty, the law requires that EPA make out a *prima facie* case against *them*.[36] EPA claimed such would be difficult due to the passage of time, the fading of memories, *etc.* Of course, this is precisely why statutes of limitation exist and why Petitioner's due process rights were violated in this case.

The District Court and the Sixth Circuit inexplicably determined that the only process due Petitioners under these circumstances was the right to cross-examine two of EPA's witnesses who testified in October, *1984* (ten years earlier) when the only adverse party was Peters. However, this badly misses the point. The right to cross-examination presupposes that an adverse party has at least made a *prima facie* showing that the violations occurred and that the parties from whom civil penalties were sought were responsible. Because EPA completely failed to meet this burden, the Petitioners had no burden and thus did not have to exercise their "right" of cross-examination. The fact that they have

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[36]. Indeed, this is precisely what the relevant rule of procedure provides. *See*, 40 C.F.R. 22.24 (1999).

now been found liable for a civil penalty under these circumstances is particularly grievous.

CONCLUSION

For each of the foregoing reasons, David B. Shillman and J.V. Peters & Company respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 99-32 15

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

		FILED
DAVID B. SHILLMAN;	)	June 29 2000
DOROTHY L.	)	Leonard Green,
BRUEGGEMEYER; and	)	Clerk
J. V. PETERS AND COMPANY,	)	
	)	
Plaintiffs - Appellants,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT FOR
UNITED STATES OF AMERICA;	)	THE NORTHERN
CAROL BROWNER, Administrator,	)	DISTRICT OF OHIO
United States Environmental	)	
Protection Agency;	)	
and UNITED STATES	)	
ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Defendants - Appellees.	)	
	)	OPINION

Before WELLFORD, SILER, and GILMAN, Circuit Judges.

No. 99-3215
Shillman v. United States

RONALD LEE GILMAN, Circuit Judge. This is a twenty-year old case about a $23,500 administrative fine imposed by the Environmental Protection Agency (EPA). David Shillman, Dorothy Brueggemeyer (Shillman's wife), and J.V. Peters & Co. petitioned the district court for judicial review of the fine levied against them. The EPA moved for summary judgment, which was granted by the district court. For the reasons set forth below, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

I. BACKGROUND

In May of 1980, David Shillman leased property in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility began operations in June of that year under the name J.V. Peters & Co, a partnership. Its partners were Brueggemeyer and John Vasi. Shillman managed the facility and maintained complete control over its daily operations. Vasi was apparently the cook for the facility's employees. In accordance with the requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k, J.V. Peters & Co. applied to the EPA for a permit to treat, store, or dispose of hazardous waste. Under RCRA, J.V. Peters & Co. was allowed to operate the facility while its EPA application was pending. *See* 42 U.S.C. § 6925(e).

In December of 1980, an inspector from the Ohio Environmental Protection Agency (Ohio EPA) visited the facility and identified eighteen violations of RCRA. The inspector's report charged, among other things,

that hazardous wastes were not being stored and handled in accordance with RCRA's requirements, and that J.V. Peters & Co. had totally failed to prepare a contingency plan for emergencies. A copy of the inspector's report was sent to J.V. Peters & Co.

Within two weeks of receiving the report, J.V. Peters & Co. was dissolved by its partners. They formed a corporation, and transferred all of the partnership's assets and liabilities to the corporate entity. The name of the corporation was J.V. Peters & Co., Inc. Shillman became president of the corporation and chairman of its board of directors. Brueggemeyer became its secretary and treasurer, and was also a member of its board of directors. The new corporation's business was identical to that of the partnership it had replaced—managing the Middlefield Township, Ohio facility. If there was any reason for this transaction other than an attempt to evade liability for already-committed or ongoing violations of RCRA, the record fails to reveal it.

In April of 1981, the EPA filed an administrative complaint against J.V. Peters & Co., Inc. based on the Ohio EPA inspector's report, assessing a $25,000 civil penalty. Shillman filed a pro se answer on behalf of J.V. Peters & Co., Inc. He admitted some of the violations, denied others, and demanded a hearing. The case was assigned to an administrative law judge (ALJ).

On September 20, 1983, the EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. The ALJ granted the motion. On February 2, 1984, the EPA filed a "First Amended Complaint." The new complaint alleged the same violations,

assessed the same $25,000 penalty, and named the same respondent – J.V. Peters & Co., Inc. – as had the original complaint. This time, J.V. Peters & Co., Inc. was represented by counsel when it answered the amended complaint. Counsel claims that the answer was based in significant part on the fact that J.V. Peters & Co., Inc. did not exist at the time the violations occurred. In fact, the answer simply denies "each and every allegation" in the EPA's complaint without comment, in boilerplate fashion.

The ALJ scheduled an evidentiary hearing, which was conducted between October 23 and October 25. 1984. Following the presentation of the EPA's case, J.V. Peters & Co., Inc. moved for a directed verdict. The ALJ denied the motion. J.V. Peters & Co., Inc. then put on its case, which for the most part consisted of Shillman testifying about the nature and the extent of the violations underlying the EPA's complaint, and about the relationship between J.V. Peters & Co., J.V. Peters & Co., Inc., and the people involved with each.

In April of 1985, the EPA filed a motion captioned as one to "Conform the Pleadings to Evidence" in an attempt to add Shillman and the now-defunct J.V. Peters & Co. as respondents. No attempt was made to add Brueggemeyer as a respondent. The ALJ did not enter an order expressly ruling on the EPA's motion. Instead, on May 15, 1985, he issued an initial decision that found Shillman and J.V. Peters & Co. both liable for the violations, and assessed a $25,000 civil penalty. The respondents appealed the ALJ's decision to the Chief Judicial Officer of the EPA.

On May 9, 1986, the Chief Judicial Officer vacated the ALJ's decision, concluding that Shillman and J.V. Peters & Co. had been denied notice of their potential liability for the penalties and the opportunity to be heard. The Chief Judicial Officer then remanded the case to the ALJ with instructions to allow the EPA to amend its complaint to name Shillman and J.V. Peters & Co. as respondents, and to grant them a hearing to present evidence on their behalf.

In June of 1986, the EPA filed a motion for reconsideration, which the Chief Judicial Officer denied. On December 17, 1986, the ALJ issued an order instructing the EPA to advise him as to how it wished to proceed. When the EPA failed to respond, the ALJ entered an order dismissing the case with prejudice for failing to comply with the order. In September of 1987, the EPA moved for relief from the dismissal. The ALJ granted the motion, permitting the EPA to file a "Second Amended Complaint."

In November of 1987, the EPA filed its Second Amended Complaint, naming as respondents J.V. Peters & Co., Inc., J.V. Peters & Co., Shillman, Brueggemeyer, and Vasi. All but Vasi filed answers denying the allegations. (Vasi, who is now deceased, did not answer. A default judgment was taken against him, and he did not appeal from that judgment.) Once again, the answer filed on behalf of J.V. Peters & Co., Inc. consisted almost exclusively of boilerplate denials and denials of knowledge and information sufficient to respond to the EPA's allegations. The closest its answer came to explaining its theory that J.V. Peters & Co., Inc. was not a proper respondent because it did not exist

when the violations occurred was the conclusory assertion of an affirmative defense based on the EPA's purported failure to join an unspecified indispensable party.

On April 13, 1988, the EPA moved for an accelerated decision (the administrative equivalent of summary judgment) against all of the named respondents on the ground that the testimony and evidence adduced at the hearing in October of 1984 established that they were all liable for the violations. The ALJ, in an order dated September 30, 1988, found Shillman, Brueggemeyer, Vasi, and J.V. Peters & Co. jointly and severally liable for the $25,000 civil penalty. Shillman, the ALJ held, was liable as the facility's "operator," and Brueggemeyer and Vasi (who were the partners in J.V. Peters & Co.) were liable as the facility's "owners." The ALJ did not find J.V. Peters & Co., Inc. liable. Additionally, the ALJ concluded that the statute of limitations defense did not apply to the government and did not apply to the type of civil penalty assessed, because it was remedial and not punitive in nature.

On October 24, 1988, all of the respondents who had been found liable (except for Vasi), appealed the ALJ's decision to the EPA's Chief Judicial Officer. The Chief Judicial Officer affirmed, holding that the EPA's Second Amended Complaint was timely filed because it "related back," in a manner consistent with Rule *15(c)* of the Federal Rules of Civil Procedure. (Although ALJs are not bound by the Federal Rules of Civil Procedure in administrative proceedings, *see Sloan v. SEC.* 547 F.2d 152, *155* (2d Cir. 1976), they may – and frequently do – look to them for guidance, as the Chief Judicial Officer acknowledged.)

On September 4, 1990, Shillman. Brueggemeyer, and J.V. Peters & Co. petitioned this court for judicial review. Pursuant to 28 U.S.C. § 1631, the case was transferred to the United States District Court for the Northern District of Ohio. The district court affirmed the Chief Judicial Officer's conclusions on the statute of limitations issue, but remanded the case to the ALJ on the grounds that Shillman, Brueggemeyer, and J.V. Peters & Co. were entitled to an evidentiary hearing.

On remand, the case was heard by a different ALJ, who determined that he would accept as evidence the testimony adduced at the 1984 hearing. The hearing took place in October of 1994. At the hearing, the EPA did not present any new witnesses, but made the witnesses who testified in 1984 available for cross-examination. Shillman, Brueggemeyer, and J.V. Peters & Co. objected, asserting that the EPA could not prove its prima facie case against them by relying on the prior testimony of the EPA witnesses in the proceeding against J.V. Peters, Inc., but was required to present live testimony. They refused to cross-examine the EPA's witnesses or to present any defense.

In July of 1995, after reviewing the 1984 transcript de novo, the ALJ issued his decision, finding Shillman, Brueggemeyer, and J.V. Peters & Co. jointly and severally liable for the violations that had occurred nearly fifteen years earlier. He assessed a fine of $23,500, concluding that the EPA had not proven one of the alleged violations. The ALJ rejected the argument that the EPA's utilization of the transcripts from the 1984 hearing deprived the respondents of their due process rights. Instead, the ALJ concluded that their rights had been

protected because the respondents were given the opportunity to cross-examine the EPA's witnesses and to present evidence on their own behalf Once again, Shillman, Brueggemeyer, and J.V. Peters & Co. appealed, this time to the Environmental Appeals Board, the successor to the Chief Judicial Officer.

On April 14, 1997, the Environmental Appeals Board issued a decision affirming the ALJ. In doing so. the Board deferred to the district court's conclusion that the EPA's complaint was not time-barred. It ruled that this determination was the law of the case. The Board also rejected the argument that the EPA's use of the 1984 testimony was a violation of due process, concluding that the testimony was "probative, relevant, and reliable," and thus properly admitted.

On May 14, 1997, Shillman, Brueggemeyer, and J.V. Peters & Co. petitioned the district court for review. Subsequently, both they and the EPA filed motions for summary judgment. The district court granted the EPA's motion and denied the petitioners' motion. In doing so, the district court concluded that the EPA's Second Amended Complaint "related back" and was thus timely filed. It also determined that the decision of the ALJ in 1994 to allow the EPA to essentially stand on the testimony presented against J.V. Peters & Co., Inc. in 1984 did not violate the respondents' rights to due process. The district court decided that due process was satisfied because the respondents were accorded an evidentiary hearing at which they had the opportunity to cross-examine the EPA's witnesses and to present evidence of their own.

II. ANALYSIS

A. Pleading strategy

In responding to the EPA's original complaint and first amended complaint, J.V. Peters & Co., Inc. filed answers denying liability, apparently on the theory that it could not be held liable for violations that occurred before it was incorporated, but without hinting at its belief that the EPA had sued the wrong entity. As noted above, the answers simply denied each and every allegation in the complaint in boilerplate fashion. From the record, it appears clear that this strategy was part of an intentional litigation tactic, intended for the benefit of J.V. Peters & Co. as much as for J.V. Peters & Co., Inc. *See* Mem. in Opp. to Mot. for Reconsideration (filed June 24, 1986, purportedly on behalf on J.V. Peters & Co., Inc.) ("[J.V. Peters & Co., Inc.] had no duty to point out to [the EPA] that it had sued the wrong entity . . . Such a defendant has no duty to implead or to affirmatively defend the case on the grounds that someone else is responsible, although it could do so . . . [O]ne must wonder whether [the EPA] is aware of the most basic principles of civil procedure."). J.V. Peters & Co.. of course, has eagerly adopted this argument.

As a matter of basic civil procedure, however, J.V. Peters & Co. is mistaken. *See* FED. R. Civ. P. 8(b) ("Denials shall fairly meet the substance of the averments denied."); *Weade v. Trailways of New England, Inc.*, 325 F.2d 1000, 1001 (D.C. Cir. 1963) (per curiam) (vacating an entry of summary judgment on statute of limitations grounds, concluding that the defendant's blanket denials of "each and

every allegation" in the complaint did not fairly meet the substance of the plaintiffs allegations, and remanding for the district court to consider whether the defendant's failure to give the plaintiff "plain notice" that he had sued the wrong corporation should estop that corporation from defending itself on that basis, and estop the related corporation that should have been named as a defendant from asserting the statute of limitations as a defense); *Eddinger v. Wright*, 904 F. Supp. 932, 935 (E.D. Ark. 1995) (concluding that under Arkansas's substantially identical Rule 8(b). an answer to a negligence complaint that simply denied "that this defendant was in any way negligent with regard to this occurrence" did not "fairly meet the substance" of the complaint, because it did not explain that the defendant's son, Robert A. Wright, and not the defendant, Robert U. Wright, who had been mistakenly served with process, was driving the car at the time of the accident) (internal quotation marks omitted). *See also Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) (estopping a corporate defendant from denying that it was the tortfeasor's employer because, among other reasons, its answer did not make clear that it was denying agency rather than simply denying liability).

In sum, a corporate defendant is not entitled to run interference for a related entity by interposing a boilerplate answer to a complaint and then participating extensively in the litigation, only to later spring the dual defenses that the plaintiff cannot proceed against the named defendant because it is the wrong party and also cannot proceed against the related entity because the statute of limitations has expired. Estopping J.V. Peters & Co., Inc. from denying that it was the owner of the property when the RCRA violations occurred would have been an

appropriate response to this litigation tactic. Another appropriate response would have been to estop J.V. Peters & Co. from asserting a statute of limitations defense.

Finally, we are at a loss to understand why the ALJ did not simply impose successor liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases. *See, e.g., B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518 (2d Cir. 1996) (applying the common-law rule that successor liability can properly be imposed if(1) the successor expressly or impliedly agreed to assume the predecessor's liabilities, (2) the transaction is a de facto merger or consolidation, (3) the successor is a "mere continuation" of the predecessor, or (4) the transaction is fraudulent).

We make note of the above points to refute the assertion of J.V. Peters & Co. that it was unfair to let the EPA decide so late in the litigation to proceed against it. Even if we were inclined to accept J.V. Peters & Co.'s argument that the EPA's assertion of claims against it came after the expiration of the limitations period (which we are not), the ALJ would have been fully justified in concluding that J.V. Peters & Co. was estopped from asserting a statute of limitations defense. And the argument of Shillman and J.V. Peters & Co. concerning the allegedly unfair procedures utilized at the 1994 hearing comes with very poor grace, because had it not been for the unreasonable litigation tactics orchestrated by Shillman, there would have been no need for a 1994 hearing. Instead, the liability of all of the potentially responsible parties could have been determined in 1984, if not earlier.

B. Statute of limitations

Shillman and J.V. Peters & Co. argue that the EPA's action against them is barred by the statute of limitations. We conclude that the amended complaint was timely filed, and that the parties' discussion of the "relation back" doctrine is misplaced. The purpose underlying the "relation back" doctrine is to permit amendments to pleadings when the limitations period has expired. *See Hill v. Shelander,* 924 F.2d 1370, 1377 (7th Cir. 1991).

In this case, the EPA filed a motion on April *15,* 1985 that, if granted, would have added Shillman and J.V. Peters & Co. as respondents. The date that the EPA formally requested permission to proceed against those respondents was within five years of the date that J.V. Peters & Co. began operating the site, and was thus within five years of the alleged violations. This satisfies the five-year limitations period that applies generally to "action[s], suit[s] or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture . . ." 28 U.S.C. § 2462; *3M Co. (Minnesota Mining & Mfg.) v. Browner,* 17 F.3d 1453, 1462-63 (D.C. Cir. 1994) (concluding that § 2462 bars the government from assessing civil penalties under the Toxic Substances Control Act for violations occurring more than five years before the commencement of the EPA proceeding). Although the EPA captioned the motion as one "To Conform Pleadings To Evidence," there can be little doubt that Shillman and J.V. Peters & Co. knew or should have known that the EPA was formally requesting leave to proceed against them.

If a motion to amend is granted, the complaint is deemed amended as of the date the proponent of the amendment sought leave to amend, and not when the request is actually granted. *See Mayes v. A T&T information Systems, Inc.*, 867 F.2d 1172(8th Cir. 1989) (per curiam). The ALJ never formally granted the request, apparently for no other reason than his understanding that it was unnecessary to do so in order to add Shillman and J.V. Peters & Co. as parties. Holding that the ALJ's understanding was incorrect, the Chief Judicial Officer concluded that the ALJ should have granted the EPA the formal permission that it had sought to proceed against Shillman and J.V. Peters &Co.

Although courts may (and in the ordinary course should) require an amendment's proponent to attach a copy of the proposed amended complaint for filing in the event the motion for leave to amend is granted, "the motion itself may be acceptable so long as it puts the opposing party on notice of the content of the amendment." *Moore v. Indiana*, 999 F.2d 1125, 1131(7th Cir. 1993). Neither Shillman (who, as president of J.V. Peters & Co., Inc., participated actively in the litigation of the EPA's case against the corporation) nor J.V. Peters & Co. argue that the EPA's failure to attach an amended complaint to its motion deprived them of notice either that the EPA was seeking permission to proceed against them, or of what the EPA was seeking to hold them responsible for. Nor did they argue in their opening brief that they were not served with process. *Cf Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (noting that arguments not raised in the proponent's opening brief are deemed abandoned, and will ordinarily not be considered). For all of the above reasons, we conclude that the EPA's action against Shillman and J.V. Peters & Co. was not barred by the statute of limitations.

But the EPA's case against Brueggemeyer is another matter. The EPA's "Motion to Conform Evidence to Pleadings" does not mention her, and it does not appear that the EPA did anything to add her as a party during the five-year limitations period. It seems fairly clear, as she argues in her brief, that the EPA knew within five years of the violations that she was a proper respondent. We thus conclude that the district court erred in not dismissing Brueggemeyer. As a practical matter, though, this may be of no great benefit to her because, under Ohio law, when a partnership has insufficient assets to satisfy a judgment—and it appears that J.V. Peters & Co. has no assets with which to satisfy a judgment—the judgment creditor may initiate an action against the partners to execute the judgment, even if the partner in question could have been made a party to the prior suit against the partnership. *See Heinz v. Steffen*, 678 N.E.2d 264, 269-70 (Ohio Ct. App. 1996).

C. Due process

Finally, we reject the argument that Shillman and J.V. Peters & Co. were deprived of their due process rights because of the ALJ's reliance on the testimony of the EPA's witnesses in the 1984 hearing against J.V. Peters & Co., Inc. Essentially, they assert that all of the evidence presented in the 1984 hearing pertained to the liability of J.V. Peters & Co., Inc., which at the time was hanging its hat on the theory that it could not be liable simply because it had not been formed when the violations occurred in December of 1980. During the proceedings in 1984 (in which Shillman participated as the president and chief executive officer of J.V. Peters Co., Inc.), the EPA produced evidence

of RCRA violations. It is uncontroverted that J.V. Peters & Co. operated the facility at the time the violations occurred and that Shillman managed all of the facility's operations. In the absence of another logical explanation, it is not unreasonable to infer that those who operated hazardous waste facilities at the time that RCRA violations occurred are responsible for the violations.

Shillman and J.V. Peters & Co. (who were and are represented by the same attorney who represented J.V. Peters & Co., Inc. at the 1984 hearing) were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to show that they should not be held responsible if they did occur. They did none of these things. Although Shillman and J.V. Peters & Co. argue that the corporation had no motivation to challenge the evidence because it could never have been held liable for the claimed violations, this is refuted by the uncontested fact that the corporation expressly assumed all of the partnership's liabilities. As noted above, we also have no idea why the ALJ did not impose liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases.

For all of the above reasons, we do not believe that the ALJ's decision to admit the testimony from the 1984 hearing was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," S U.S.C. § 706(2), which is the standard by which this court must assess the ALJ's legal determinations. *See National Engineering & Contracting Co. v. OSHA*, 928 F.2d 762, 767 (6th Cir. 1991).

III. CONCLUSION

In summary, the EPA's action against Shillman and J.V. Peters and Co. was timely filed without the benefit of the "relation back" doctrine. The EPA's case against Brueggemeyer is barred by the statute of limitations, although the EPA would presumably be able to proceed against her in an action to enforce any judgment against J.V. Peters & Co. Finally, because Shillman and J.V. Peters & Co. were afforded the right to cross-examine the EPA's witnesses, and the opportunity to present evidence to refute their responsibility for the RCRA violations that concededly occurred at the facility under Shillman's management, their due process rights were not violated by the 1994 ALJJ hearing.

This case has dragged out appallingly. Part of the blame rests with the EPA, whose procedural ineptitude in this action leaves little to be proud of. But a greater portion of the blame for the delay rests with Shillman and the incorporated and unincorporated incamations of J.V. Peters & Co. Fortunately, all litigation must eventually end. This case is no exception. For all of the reasons set forth above, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

HARRY W. WELLFORD, Circuit Judge, **concurring in part and dissenting in part:**

This unnecessarily complicated case arises becALJse of clear negligence and misfeasance on the part of representatives of the Environmental Protection Agency ("EPA") in not pursuing adequately claims of improper operation of a hazardous waste storage site in Middlefield Township. Ohio, between *June and December of 1980.* Judge Gilman has carefully set out the series of blunders and missteps committed by the EPA, its representatives, and its lawyers in attempting to levy a fine against the operator of that site in pursuit of the asserted statutory remedy for the alleged violations.

The unfortunate series of events began when the EPA assessed the $25,000 civil penalty (for the alleged 1980 violations) against the corporation which, of course, was not even in existence in 1980. This initial effort was aborted in 1983 by a motion to withdraw the initial Complaint after an answer was filed by the corporation. Over three years after the inspection, the EPA filed a "First Amended Complaint," asserting essentially the same things as the initial withdrawn Complaint, against – once again – *only* the corporation. There was no claim of any personal or partnership liability. Once again, the corporation answered and denied liability.

By the time of the hearing in October of 1984, the EPA had almost four years in which to identify specifically the responsible party or parties, but still sought liability against *only* J.V. Peters & Co., Inc. The EPA's proof at that hearing did not indicate personal liability

against Shillman or his wife, the corporate officers, nor against Vasi, the former partner. The corporation then moved for a directed verdict. I am of the view that it should have been granted. The EPA failed to make out a case for violations when the corporation was not in existence. At that juncture, as Judge Gilman acknowledges, the EPA made no motion at that point to assert possible successor liability against the corporation or to asset personal liability against the corporate officers (and former partners).

Subsequently, the April 1985 motion by the EPA sought to "conform pleadings to evidence." The ALJ hearing the case did not rule upon this EPA motion but held, erroneously in my view, Shillman personally liable, as well as J.V. Peters & Co., the partnership. The apparent basis for this holding, without any advance notice to Shillman or the partnership, was that they should have been named defendants and responsible parties. In 1986, the chief judicial officer of the EPA properly vacated this 1985 decision of the ALJ. This action should have ended the controversy once again; more than five years had passed and the EPA had only named J.V. Peters & Co., Inc. as a defendant and responsible party. Any effort by the EPA to name someone else--Shillman or the partners of J.V. Peters & Co.--would have been a new action, and probably time-barred. The chief judicial officer, however, remanded the case after denying the EPA's motion for reconsideration in 1986 to allow the EPA to amend its complaint against the corporation. In any event, the ALJ, upon remand in 1987, dismissed the case because the EPA failed to file any amendment. This was now some seven years after the alleged violations.

I would hold this action by the ALJ to be correct and a proper dismissal under the circumstances. Not until September of 1987 did the EPA move for relief, again without filing any purported amendment which would give the first notice that it was very belatedly--too late from my perspective--seeking to hold Shillman. his wife, and Vasi responsible personally. I would adjudge the November, 1987 "second Amended Complaint" to be without effect, too late, and precluded by the EPA's ineffectual prior actions over many years.

Shillman is certainly not a paragon of virtue in this case. Had the government made a modicum of effort to discover and assert in a timely fashion the true facts as to responsibility for the 1980 violations, if any, the result, in my view, would have been entirely different. The EPA simply failed in this effort, regrettably, and I have found no effort to explain its deficiencies in the record.

If I am unsuccessful in persuading my brothers to deny the "relief" gratuitously granted the EPA. I would, in any event, deny any interest on the fine asserted against any individual defendant prior to 1994.

I, therefore, respectfully dissent from the decision of Judge Gilman except as to that part denying direct personal liability against Shillman's wife, Dorothy Brueggemeyer.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID B. SHILLMAN, *et al.*,	)	CASE NO.: 1:97CV1355
	)	
Petitioners,	)	
	)	Judge John M. Manos
vs.	)	
	)	
UNITED STATES OF	)	
AMERICA ENVIRON-	)	MEMORANDUM OF
MENTAL PROTECTION	)	OPINION
AGENCY,	)	
	)	
Respondent.	)	

On May 14, 1997, David B. Shillman, Dorothy L. Brueggemeyers, and J.V. Peters & Company, Petitioners, brought this action seeking judicial review of an administrative decision entered against them and in favor of the United States Environmental Protection Agency ("EPA"). Both petitioners and respondent filed motions for summary judgment. For the reason provided below, EPA's motion as to the complaint and counterclaim is granted, and the petitioners' motion is denied.

I. FACTUAL BACKGROUND

Beginning in May 1980, David Shillman leased property located at 17030 Peters Road in Middlefield Township, Ohio. In June of 1980, a Partnership, "J.V. Peters & Company" ("the Partnership") consisting

of Shillman, Dorothy Brueggemeyer (Shillman's wife) and John Vasi, operated a hazardous waste storage and reclamation facility ("the Facility"). Shillman managed the Facility and was in complete control over its daily operations. (Environmental Appeals Board's Final Decision and Order, In re J.V. Peters and Co., RCRA (3008) Appeal No. 95-2, at 6 (Apr. 14, 1997)("EAB Decision").

The Partnership was governed by the "Interim Status Standards" in accordance with the Resource Conservation and Recover Act ("RCRA") § 3005 (e), 42 U.S.C. § 6925 (e).[1] These standards permitted the Partnership to remain operational, as long as it met the requirements specified during this period, while its permit application was being reviewed by the EPA.

On December 17, 1980, a Melinda Becker, an inspector employed by the Ohio Environmental Protection Agency ("Ohio EPA"), inspected the Facility and submitted a report to the United States Environmental Protection Agency (the "EPA") attributing eighteen

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[1]. On May 15, 1980, the EPA promulgated a set of regulations for facilities which stored, treated, or disposed of hazardous materials. The regulations provided that owners or operators of hazardous waste facilities which registered with EPA by November 19, 1980 (through a process called a "Part A application") were automatically entitled to "interim status" until EPA required them to submit a "Part B application". Facilities with "interim status" had to comply with "Interim Status Standards" set forth in 40 C.F.R. Part 260, effective November 19, 1980. The Partnership began operating prior to November 19, 1980, this, it was governed by the Interim Status Standards.

violations of the Interim Status Standards to the Partnership.[2] She also provided a copy of the report to the Partnership.

On January 30, 1981, about two weeks after receiving the report, the Partnership was dissolved and its assets were transferred to an Ohio Corporation, the J.V. Peters and Company, Inc. ("the Corporation"), formed by Shillman and Brueggemeyer. The business of the Corporation was identical to that of the Partnership. Shillman served as the Corporation's president and chairman of the board. Shillman served as the Corporations' president and chairman of the board. Brueggemeyer was its secretary and treasurer. (EAB Decision, at 7).

II. PROCEDURAL HISTORY

On April 17, 1981, the EPA filed an administrative complaint against J.V. Peters and Company and assessed a $25,000 civil penalty against it based upon the findings from the December 1980 inspection, pursuant to 42 U.S.C. § 6928 (a) and 40 C.F.R. § 22.13. On May 12, 1981, Mr. Shillman, in his capacity of president and chairman of the board, answered the complaint. While insisting that the penalty could not stand against the Corporation because it did not exist at the time the

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[2]. Section 3004 of RCRA sets forth standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities. See 42 U.S.C. § 6924. Section 3008 of RCRA permits the EPA to order violators to pay a civil penalty for any past or current violation and requires compliance with the order. 42 U.S.C. § 6928 (.)(1). Further, all orders are final unless a public hearing is requested, upon which, the EPA shall conduct a public hearing. 42 U.S.C. § 6928 (b). If any person named in the order fails to comply, the EPA may assess a penalty of up to $25,000 per day of noncompliance as well as suspend or revoke any permit issued to the violator. 42 U.S.C. § 6928 (c).

alleged violations occurred, he admitted some of the violations and denied others.

Administrative Law Judge ("ALJ") Marvin Jones was assigned this case. On September 20, 1983, EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. ALJ Jones granted this motion pursuant to 40 C.F.R. § 22.14(e).

On February 2, 1984, EPA filed a new complaint, captioned "First Amended Complaint," alleging the same violations as the original compliant, assessing the same $25,000 civil penalty, and naming only the Corporation. Despite objecting that the "amended" complaint was a new complaint because the original complaint had been dismissed without prejudice, the Corporation answered the complaint and, again, raised the defense that it was not in existence when the violations occurred. ALJ Jones set the matter for an evidentiary hearing pursuant to 42 U.S.C. § 6928 (b).[3]

The hearing lasted from October 23 to 25, 1984. After the EPA presented its case, the Corporation moved for a directed verdict, against asserting that it was not in existence on the date of the alleged violations. The ALJ denied the motion. Afterward, the Corporation put on its case consisting primarily of Shillman's testimony on the nature and the extent of the violations occurring in the December 1980 and the relationship

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[3]. 42 U.S.C. § 6928 states, in pertinent part"

> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing.

between the Partnership, the Corporation, and the individuals involved with each.

In April of 1985, over five months after the hearing, the EPA filed a motion to amend its complaint in order to add the Partnership and Shillman – Brueggemeyer was not named. The ALJ did not rule on this motion. Instead, on May 15, 1985, ALJ Jones issued his initial decision, finding the Corporation, the Partnership, and Shillman liable for the violations and imposed the $25,000 civil penalty. All three respondents appealed this decision, and the matter was referred to the Chief Judicial Officers (the "CJO") of the EPA.

On May 9,1976, the CJO vacated the ALJ's decision on the ground that the Partnership and Shillman were prejudiced by being denied fair notice of their potential liability for the penalty assessed against the Corporation and by being denied an opportunity to contest their liability. The CJO, however, remanded the order and with instructions that the EPA be permitted to amend its complaint to name the Partnership and Shillman and that each should have a hearing to present evidence before being subject to liability for the civil penalty.

In June 1986, EPA filed a "motion for Reconsideration", which was denied by the CJO. On December 17, 1986, the ALJ issued an order instructing the EPA to notify him of how it wished to proceed, given the CJO's opinion. The EPA did not respond. Subsequently, the ALJ dismissed the case with prejudice on the ground that the EPA was in default for failing to comply with his December 17th order. In September of 1987, EPA sought relief from the dismissal. On October 16, 1987, the ALJ issued an order granting the EPA's motion for relief from default and permitting it to a file a second amended complaint.

In November of 1987, EPA filed a "Second Amended Complaint" naming the Corporation, the Partnership, Shillman, Brueggemeyer and Vasi. All except Vasi[4] filed answers denying the allegations. Once again, the Corporation asserted the defense that it did not exist on the date the violations occurred. The others asserted that the statute of limitation had expired and therefore the claims were time-barred according to the five year statute of limitations set out in 28 U.S.C. § 2462.[5]

On April 13, 1988, the EPA moved for an accelerated decision, pursuant to 40 C.F.R. § 22.20[6], against each of the respondents on the ground that the testimony and evidence adduced at the October 1984 hearing established that all of those named in the second Amended complaint were liable for the December 1980 violations.

On September 30, 1988, the ALJ granted the EPA's motion for an accelerated decision. Relying on the testimony from the hearing held in October 1984 and the answers to the second amended complaint, the ALJ found Shillman, Brueggemeyer and Vasi and the Partnership jointly and severally liable for the $25,000 civil penalty. He detailed that Shillman was liable as the "operator" of the Facility, and Brueggemeyer and Vasi were liable as the Facility's "owners". He did not find the

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[4]. Because Vasi never answered the second amended complaint, the ALJ found him to be in default and determined that the admitted all of the allegations against him. Vasi did not appeal the decision. He is now deceased.

[5]. § 2462 provides that no action shall be entered "unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462

[6]. 40 C.F.R. § 22.20 provides that the ALJ may issue an accelerted decision without conducting a hearing if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Corporation liable. He also rejected the statute of limitations defense as not applying to the government and not applying to the type of civil penalty assessed (remedial in nature rather than a sanction).

On October 24, 1988, the Partnership, Shillman and Brueggemeyer appealed to the CJO. On August 7, 1990, the CJO issued a decision affirming the ALJ's granting of an accelerated decision in favor of the EPA. He also found that the second amended complaint was filed timely under the "relation back" doctrine of the Federal Rules of Civil Procedure 15(c).

On September 4, 1990, the Partnership, Shillman, and Brueggemeyer appealed to the United States Court of Appeals for the Sixth Circuit, pursuant to the provisions of the Administrative Procedure Act 5 U.S.C. § § 704, 706. On December 13, 1990, the case was transferred to this Court, pursuant to 28 U.S.C. § 1631.[7] The Court affirmed the CJO's ruling on the statute of limitations issue, but remanded the case on the ground that the Partnership, Shillman, and Brueggemeyer were entitled to a public hearing, and ordered the ALJ to

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[7]. Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition of review of administrative action, is noticed for or filed with such a court and that court shall, if it is in the interest of justice, transfer such action or appeal to any court in which the action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it is was actually filed in or noticed for the court from which it is transferred.

conduct an evidentiary hearing allowing them the opportunity to present evidence to contest their liability for the penalty. See 42 .S.C. § 6928(b).

On remand, the case was heard by ALJ Gerald Harwood. In September of 1993, ALJ Harwood informed the parties that he would accept as evidence testimony from the 1984 hearing. In October of 1994, he held the evidentiary hearing. The EPA did not present new witnesses, but made its witnesses who testified in 1984 available for cross examination. During the hearing, the petitioners, for the first time, objection to the EPA's reliance upon the testimony from the 1984 hearing. They argued that EPA could not establish a *prima facie* case merely relying on prior testimony and not examining live witnesses. Despite ALJ Harwood's offer to permit Petitioners to cross-examine the witnesses, the petitioners declined to do so, and refused to present any defense. The ALJ reviewed the 1984 transcript *de novo*.

In July of 1995, ALJ Harwood issued his decision, finding the Partnership, Shillman, and Brueggemeyer jointly and severally liable for the violations and assessing a civil penalty of $23,500 against them.[8] He concluded that incorporating the testimony from the 1984 hearing into the record did not deprive the petitioners of their due process right because the petitioners were provided the opportunity to cross-examine witnesses and present evidence in their defense, even though they declined to do so. Petitioners appealed to the Environmental Appeals Board ("EAB"), the successor to the CJO.

On April 14, 1997, the EAB issued a decision rejecting the petitioners' argument that the complaint was time-barred, deferring to

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[8]. The initial penalty of $25,000 was reduced by $1500 by Judge Harwood.

this Court's prior ruling as binding precedent. The EAB found that Judge Harwood correctly followed the Court's ruling rejecting the statute of limitations defense and, thus, affirmed Judge Harwood's refusal to dismiss. The EAB also found no due process violations after considering the numerous opportunities the petitioners had to present their case and their wide latitude accorded the ALJ in structuring hearings. The EAB described the evidence from the hearings held in 1984 as "probative, relevant, and reliable, and thus properly admitted against Respondents." (EAB Decision, at 31.)

On May 14, 1997, Petitioners filed a complaint seeking judicial review of the final decision of the EPA imposing liability and assessing a $23,500 fine. On October 20, 1997, the EPA filed an amended answer and counterclaim seeking a judgment of $23,500 plus accrued interest, penalties, and costs since June 17, 1997 against J.V. Peters and Company, Shillman and Brueggemeyer, jointly and severally. On February 3, 1998, the EPA moved for summary judgment on the complaint and its counterclaim. On April 1, 1998 filed a cross motion for summary judgment.

III. STANDARD OF REVIEW

A. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identified which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48.

B. Judicial Review of a Final Administrative Decision

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of agency action. The reviewing court shall -

. . . (2) hold unlawful and set aside agency action, findings and conclusions bound to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

IV. STATUTE OF LIMITATIONS

A. Law

The applicable statute of limitations, 28 U.S.C. §2462, imposes a five year time limitation on the commencement of any action to recover civil penalties. Any action may, however, survive the statute of limitations restriction if it "relates back" to a complaint filed within the proper time period.

The doctrine of relation back, found in Federal Rules of Civil Procedure 15 (c), allows amendments to pleadings if they "relate back" to the original pleading. An amendment "relates back" to the date of the original pleading when:

1) relation back is permitted by law that provides the statute of limitations applicable to the action, or
2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provisions (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c) (West. 1998).[9]

The language of 15(c) requires that four factors be present in order for an amendment to relate back:

(1) the basic claim must have arise out of the conduct set forth in the original pleading;

(2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;

(3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and

(4) the second and third requirements must have been fulfilled within the prescribed limitations period.

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[9]. In 1991 Fed. R. Civ. P. 15 (c) (3) was amended to expand the time frame required for notice of the lawsuit to be given to defendants by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period. This added the time allowed for service of the complaint under Rule 4(m) to the time period established by Schiavone. This change however, is not applicable in this case. The same standard for relation back that governed the Court's 1991 decision is relevant here.

Schiavone v. Fortune. 477 U.S. 21, 29 (1986).

A "mistake" under 15(c)(3) refers to an error concerning the proper identification of a party, and relation back is only permitted to correct a misnomer of a defendant where the proper defendant is already before the court. Worthington v. Wilson, 8 F.3d 1253, 1256 (1993). A mere lack of information on the identity of a party, such as naming a John Doe defendant and seeking to add the correct party after the statute of limitations has expired, is not sufficient to constitute a mistake. Id; see also Cos v. Treadway, 75 F.3d 230, 240 (1967). A mistake must be an error in naming the correct party. The effect of correcting such a mistake is merely to change the name under which a defendant is sued. Worthington v. Wilson, 8 F.3d at 1256.

B. ANALYSIS

The first issue before this Court is whether the CJO's decision that the second amended complaint was not time-barred is correct. petitioner argues that the CJO's decision was incorrect because the complaint was filed outside of the five-year statute of limitations and did not relate back to the previously filed action. Respondent counters that the CJO correctly determined that the second amended complaint related back, and, thus, was timely filed. In 1991, the Court reviewed this issue and affirmed the decision of the CJO.

After a thorough review of this case, the Court finds, as it did in 1991, that the CJO's determination that the second amended complaint related back was correct.

The CJO applied Rule 15(c) to resolve the statute of limitations questions by determining whether the doctrine of relation back was

applicable. In 1991, in accordance with section 19(e) of the A.P.A., 5 U.S.C. § 706, which requires the reviewing court to set aside any action taken that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the Court considered whether the CJO's rejection of petitioners' time-bar argument was neither arbitrary and capricious, nor an abuse of discretion or violation of a constitutional right held by Petitioners and found that it was not.

The Court reiterates that the CJO had wide latitude such decisions, and properly concluded that the application of Rule 15 was proper. Furthermore, the CJO applied Rule 15 in a reasonable manner that was consistent with notions of fundamental fairness. As the Court stated in its Memorandum of Opinion issued in 1991,

> Rule 15(c) is an essential rule of federal practice; its proper application is consistent with fundamental concepts of fairness and notice. Moreover, the rule was applied in a reasonably fair manner by the CJO in this case; it is not disputed that the claim arose out of the conduct set forth in the first amended complaint; the additional parties, Shillman Brueggemeyer, and the partnership, had sufficient notice of the USEPA action before April 1985 that they could properly maintain a defense; and they should have been aware by April 1985 that, notwithstanding the fact that the USEPA brought its action against the corporation, that they could be potentially liable for the violations.

J.V. Peters and Co., Inc. v. William K. Reilley, Adm'r U.S. Environmental Protection Agency No. 1:90CV2246, slip op. at 12 (N.D. Ohio Aug. 13, 1991).

Although Rule 15(c)(3) was amended in 1991, the parties agree that the portion of the rule applicable to this case was not altered by the amendment.[10] The parities also agree that first two criteria of 15(C)(3) have been met: (1) the claims against the petitioners arose out of the same conduct and that (2) the petitioners received notice within the statute of limitations. (Petitioners' Cross-Motion for Summary Judgment at 20.) They disagree however, as to whether "the Petitioners knew, or should have known that, but for a mistake in identity of the proper party, EPA would have named them as respondents within the limitations period." (Id.)

The Sixth Circuit has stated that the failure to name a proper party to a lawsuit must result form a mistake in name only, and fixed by "correct[ing] of misnomers . . . but not the addition or substitution of new parties after the statute of limitations has expired." In Re Kent Holland, 928 F.2d 1448, 1450 (6th Cir. 1991), citing Ringrose v. Engelberg Huller, 692 F.2d 402, 405 (6th Cir. 1982).

The CJO found that the Petitioners knew or should have known that but for a mistake in naming the parities, the EPA would have named them as the parties responsible for the violations. The record supports that conclusion. The EPA intended to bring a lawsuit against those responsible for the violations at the Facility. When the original

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[10]. Prior to December 1991, subsection (3) of Rule 15(c) did not contain the language "within the period provided by rule (m) for the service of the summons and complaint." Instead the rule said "within the limitations period." The 1991 Amendment enlarged the relevant time period by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period, thereby, adding the time allowed for service for the complaint under Rule 4(m) to the time period established by Schiavone v. Fortune, 477 U.S. 21 (1986). E.g., Lovelace v. O'Hara, 985 F.2d 847, 850 (6th Cir. 1993).

complaint was filed in April of 1981, the Corporation was the owner and operator of the Facility, Shillman was the president and chairman of the board, and Brueggemeyer was the secretary and treasurer. Shillman answered the evidentiary hearing held in 1984, it was established that the Partnership had transferred all of its assets and liabilities to the Corporation. In April 1985, the EPA filed a motion to amend in order to include Shillman and the Partnership. Though the ALJ did not rule on this motion, the EPA had made the effort to name the correct parties while still within the statute of limitations. When the EPA filed its "Second Amended Complaint," it did name the proper parties; the Partnership, Shillman, Brueggemeyer, and Vasi. Given the fact that the parties were so interrelated and that Shillman and Brueggemeyer were intricately involved in the case from its inception, the CJO correctly found that an "identity of interests" existed between the Corporation and the Partnership. This "identity of interests" was so close that, the CJO concluded, Petitioners should have known that but for a mistake by EPA, they would have named the correct party in the lawsuit. Schiavone v. Fortune, 477 U.S. at 28.

The parties were essentially one and the same. The Court does not find credible Petitioners argument that there was not way they could have known of EPA's true intention to sue the Partnership until the "Second Amended Complaint" had been filed in late 1987. Given that there was such a close commonality of interest and identity, but for the EPA's misdesignation in name only, the Partnership, Shillman, and Brueggemeyer knew or should have known that they were involved in the lawsuit. Thus, the Court affirms the rulings of the CJO finding that the doctrine of relation back applies and that the second amended complaint was filed timely.

V. DUE PROCESS VIOLATIONS

A. Law

According to 40 C.F.R. § 22.24, "the complainant has the burden of . . . proving that the violation occurred . . . and that the proposed civil penalty . . . is appropriate. Following the establishment of a prima facie case, respondents shall have the burden of presenting and of going forward with any defense." 40 C.F.R. §22.24. Thus EPA had the burden of establishing a *prima facie* case before Petitioners were obligated to present any defense.

The fundamentals of due process require only that Petitioners be given the opportunity to be heard in a "meaningful time and in a meaningful manner." Matthews v. Eldrige, 424 U.S. 319, 333 (1976), citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, a presiding officer possesses "wide discretion to control the order and format of administrative hearings." EAB Decision at 26. The Agency's Consolidated Rules of Practice ("the Rules") gives a presiding officer the authority to "do all . . . acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. § 22.04 (c) (10).

Additionally, the Rules clearly allow for the use of written statements in lieu of live testimony. See 40 C.F.R. § § 22.22 (c) & (d).[11]

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[11]. § 22.22 (c) states, in relevant part: "The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness." 40 C.F.R. § 22.22 (c).

§ 22.22 (d) states, in relevant part: "The Presiding Officer may admit into evidence

(See also EAB Decision at 26.) However, even when the rules do not specifically provide for nonoral testimony, the presiding officer has explicitly authority to allow it. Section 22.22 (b) states that witnesses shall be examined orally, "*except as otherwise provided* in these rules of practice or *by the Presiding Officer*." 40 C.F.R. § 22.22 (b) (emphasis in the original).

Courts have found that declarations and exhibits may be accepted in lieu of live testimony consistent with the due process as long as "the parties [a]re afforded 'amply opportunity to submit their evidence.'" See In Re Adair, 965 F.2d 777, 779 (1992) (upholding bankruptcy court's standard procedure requiring written direct testimony and oral cross and redirect examinations as not violative of due process). Fed. R. Evid. 611 (a) permits courts to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence" to ensure that: 1) truth is ascertained; and 2) needless consumption of time is avoided. Fed.R.Evid. 611.

Additionally, Fed. R. Civ. P. 43 (a)[12] "ensures that the accuracy of witness statements may be tested by cross-examination and . . . allow[s] the trier of fact to observe the appearance and demeanor of the witnesses." See In Re Adair, 965 F.2d at 779; see also Saverson v. Levitt. 162 F.R.D. 407 (1995) (admitting direct testimony by way of

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affidavits of witnesses who are unavailable. The term 'unavailable' shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence." 40 C.F.R. § 22.22 (d).

[12]. . Rule 43 (a) states: [i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

declaration or written affidavit in lieu of the usual method of direct examination, as long as a full cross-examination was permitted).

B. ANALYSIS

Petitioners claim that ALJ Harwood erred in allowing EPA to establish its *prima facie* case against them in 1994 by relying on testimony from the 1984 hearing and making witnesses available for cross-examination.

In September of 1993, thirteen months before the hearing took place, ALJ Harwood notified the parties that 1984 testimony would be accepted. Petitioners expressed no objections until the day the hearing commenced, at which point they argued that due process required EPA to present live witness testimony in order to establish its *prima facie* case. This argument lacks merit.

An ALJ, like any presiding officer, has wide latitude in structuring the hearing as long as both sides are given the opportunity to present evidence on their behalf. ALJ Harwood's procedures were consistent with due process. In fact, he conducted the 1994 hearing in accordance with the Court's 1991 Opinion requiring that the petitioners be given the "opportunity to present evidence" in defense of the penalty assessed against them. J.V. Peters v. Reilly, No. 1:90 CV 2245 (N.D. Ohio Aug. 13, 1991) (Order). He allowed the EPA to submit the 1984 testimony in lieu of live witness testimony; however, he required that witnesses be made available for cross-examination. Petitioners had the opportunity to cross-examine each witness as well as present their own evidence, but chose to do neither. They cannot now claim a violation of due process.

Petitioners contend they were denied the opportunity to object to the 1984 evidence, but did not specify to what they would have objected if they had been given the chance. They also contend the ALJ was not able to assess the credibility of witnesses. The ALJ noted in his decision that had Petitioners conducted cross-examination of witnesses, he would have had that opportunity.

Petitioners further contend that the evidence against them was inadmissable hearsay because they were not parties to the lawsuit at the time of the 1984 hearing. The EAB Decision correctly stated that the "controlling inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable." EAB Decision at 30. See also 40 C.F.R. § 22.22 (a).[13] The court is not persuaded by these arguments.

The EAB Decision correctly found that the acceptance of written testimony with the opportunity for live cross-examination comports with the requirements of due process and are within the discretion of the presiding officer. The Court finds the EAB correctly concluded that the Presiding Officer had afforded Petitioners "all that was required by due process," and Petitioners' failed to take advantage of these opportunities simply did not rise to the level of a due process violation." EAB Decision at 20.

Because the Presiding Officer has wide discretion in deciding what evidence is admissible, the EAB Decision correctly found that his decisions are accorded "substantial deference." EAB Decision at 30.

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[13]. . 40 C.F.R. § 22.22 (a) states, in pertinent part: "The Presiding Officer shall admit all evidence which is not relevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value."

The Presiding Officer's decision to admit the 1984 testimony because it was relevant, reliable, and probative was not an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, Respondent's Motion for Summary Judgment is granted as to the complaint and counterclaim and Petitioners' Motion for Summary Judgment is denied. Accordingly, a judgment for $23,500.00 plus interest accrued since June 17, 1997, penalties, and costs is hereby entered against Petitioners, David B. Shillman, Dorothy L. Brueggemeyer, and J. V. Peters & Company, jointly and severally.

IT IS SO ORDERED.

/s/ JUDGE JOHN MANOS
UNITED STATES DISTRICT JUDGE